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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER,  
Plaintiff,

vs.

HARRAH'S ENTERTAINMENT, INC.;  
HARRAH'S OPERATING COMPANY, INC.;  
HARRAH'S MARKETING SERVICES  
CORPORATION; HARRAH'S LICENSE  
COMPANY, LLC; HARRAH'S LAUGHLIN,  
INC.; HBR REALTY COMPANY, INC. and  
DOES 1 through 100, inclusive,  
Defendants.

CASE NO. 07-CV-2132-DMS (AJB)  
[Consolidated with 07 CV 2226 DMS (POR)]

Judge: Hon. Dana M. Sabraw  
Mag. Judge: Hon. Anthony J. Battaglia

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION  
BY DEFENDANTS TO REMAND ACTION  
TO STATE COURT DUE TO LACK OF  
DIVERSITY JURISDICTION

ACCOMPANYING DOCUMENTS:  
NOTICE OF MOTION AND MOTION;  
DECLARATION OF RONALD R. GIUSSO;  
REQUEST FOR JUDICIAL NOTICE

Date: June 13, 2008  
Time: 1:30 p.m.  
Courtroom: 12

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## I.

**INTRODUCTION**

In his recent oppositions to Defendants' motions to dismiss pursuant to F.R.Civ.P. Rule 12, KINDER admits that the total number of calls made by "Harrah's entities" to his infamous telephone number is 7. (Exhs. 3, 4.) Previously, in his Original Complaint and his First Amended Complaint, KINDER did not identify the total number of alleged telephone calls that he claims violated the Telephone Consumer Protection Act ("TCPA"). (Exhs. 1, 2.) Now that the total number of alleged telephone calls at issue is known and is not in dispute, it is apparent that even if KINDER makes out "willful" violations of the TCPA, the maximum he could recover for each such telephone call is \$1,500. Adding in a very liberal estimate for attorneys' fees on top of that figure still falls far short of the \$75,000 amount in controversy required for this Court to maintain diversity jurisdiction over this action. Defendants requested that KINDER stipulate to remand this action to Superior Court, but he refused claiming that punitive damages may meet the jurisdictional threshold. Accordingly, Defendants move this Court to remand this action to San Diego County Superior Court, given KINDER's judicial admissions that the total amount in controversy at the time of removal was far short of this Court's jurisdictional threshold.

## II.

**PERTINENT FACTS**

KINDER filed his complaint against Defendant Harrah's Entertainment, Inc. on October 2, 2007 (Exh. 1.) In his complaint, KINDER alleges violations of the Telephone Consumer Protection Act (Exh. 1 at ¶¶ 5-9), California Civil Code § 1770 (*Id.* at ¶¶ 10-15), Unfair Business Practices Act (*Id.* at ¶¶ 21-23), and an alleged trespass to chattel (*Id.* at ¶¶ 16-20.)-On November 21, 2007, *Specially Appearing* Defendant Harrah's Entertainment, Inc. removed this matter to the United States District Court pursuant to 28 United States Code §§ 1332 and 1441(b). Thereafter, on January 30, 2008, KINDER filed a First Amended Complaint and named Defendants Harrah's Operating Company, Inc.; Harrah's Marketing Services Corporation; Harrah's License Company, LLC; Harrah's Laughlin, Inc.; and HBR Realty Company, Inc. (Exh. 2.)

1 KINDER's original complaint did not quantify the total number of telephone calls which he  
2 alleges "Harrah's" made to his (619) 999-9999 telephone number. (*See generally*, Exh. 1.) In his  
3 First Amended Complaint, KINDER mentions seven telephone calls that are at issue, but does not  
4 quantify the total number of telephone calls. (Exh. 2.)

5  
6 In his opposition to *Specially Appearing* Defendant's Motion to Dismiss brought pursuant  
7 to F.R.Civ.P. Rule 12, KINDER's counsel, Chad Austin, declares as follows:

8 Plaintiff has in his possession, and I have personally listened to, the  
9 tape recordings of each and every call (**seven in total**) made by  
10 Defendant to Plaintiff's number assigned to a paging service 619-  
999-9999, a San Diego, California number. (Exh. 3 at ¶ 3.)

11 Attorney Austin's declaration was submitted in support of Plaintiff's opposition to the motion to  
12 dismiss filed by *Specially Appearing* Defendants Harrah's Operating Company, Inc. and Harrah's  
13 Marketing Services Corporation.

14  
15 Attorney Austin filed an identical declaration in support of Plaintiff's opposition to the  
16 F.R.Civ.P. Rule 12 Motion to Dismiss filed by *Specially Appearing* Defendants Harrah's License  
17 Company, LLC; Harrah's Laughlin, Inc.; and HBR Realty Company, Inc. (Exh. 4 at ¶ 3.)

18  
19 Prior to Attorney Austin's declarations under penalty of perjury, KINDER had not  
20 quantified the total number of telephone calls that he alleges were made in violation of the TCPA  
21 and related statutes, by the "Harrah's entities." (*See*, Exhs. 1, 2.)

22  
23 Assuming that Plaintiff can make out a "willful" violation of the Telephone Consumer  
24 Protection Act, the maximum amount of recovery on each such violation is \$1,500. (47 U.S.C.  
25 § 227(b)(3).) Inasmuch as KINDER has admitted that only **seven** telephone calls were made by  
26 any "Harrah's entity" to his infamous telephone number, this means a maximum recovery of  
27 \$10,500. Factoring in a liberal apportionment of attorneys' fees on top of that \$10,500 figure, the  
28 total amount in controversy falls far short of the jurisdictional threshold amount of this Court for

1 diversity jurisdiction. (*See*, 28 U.S.C. §1332(a).) Although KINDER has other causes of action, it  
 2 is doubtful that he could maintain double or triple recovery on the same telephone calls.

3  
 4 Counsel for Defendants attempted to meet and confer with Attorney Austin prior to filing  
 5 the instant motion to remand, to obtain a stipulation to remand. Although Attorney Austin did not  
 6 dispute that the total number of telephone calls at issue was only 7, he would not stipulate to the  
 7 remand and maintained that the possibility of punitive damages would put the amount in  
 8 controversy over \$75,000. (Giusso Decl., ¶ 3.)

9  
 10 Based on Attorney Austin's admissions, it is apparent that, at the time of the removal of  
 11 this action, because there were only seven telephone calls made by any "Harrah's entity" to  
 12 KINDER's number, the jurisdictional threshold of \$75,000 was never met.

### 13 14 III.

#### 15 AUTHORITY

16 If it is shown that the amount in controversy was less than \$75,000 at the time of removal,  
 17 the matter is appropriately remanded to state court. (*Sierminski v. Transouth Financial Corp.*, 216  
 18 F.3d 945, 949 (11<sup>th</sup> Cir. 2000).) Where the complaint contains no allegation as to the amount in  
 19 controversy, an admission by plaintiff or his counsel that the claim was never more than \$75,000  
 20 may support a remand motion. (*See, Asociacion Nacional de Pescadores v. Dow*, 988 F.2d 559;  
 21 565 (5<sup>th</sup> Cir. 1993); *Maxom v. Texaco Refining and Marketing, Inc.* 905 F.Supp. 976, 979 (N.D.  
 22 OK 1995).)

23  
 24 As the Court is aware, diversity jurisdiction exists only "where the matter in controversy  
 25 exceeds the sum or value of \$75,000 exclusive of interest and costs . . ." (28 U.S.C. § 1332(a).)  
 26 The amount in controversy for jurisdictional purposes is determined by the amount of damages or  
 27 the value of the property that is the subject of the action. (*Hunt v. Washington State Apple*

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*Advertising Commission*, 432 U.S. 333, 347-48 (1977); *Meisel v. Allstate Indemnification Company*, 357 Supp.2d 1220, 1225 (E.D. CA 2005).) If attorney fees are recoverable by a plaintiff by a statute or contract, the fee claim is included in determining the amount in controversy. (*Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9<sup>th</sup> Cir. 1998).)

The amount in controversy, if it includes punitive damages, is closely scrutinized by the trial court. (*See, Anthony v. Security Pacific Financial Services, Inc.*, 75 F.3d 311, 315 (7<sup>th</sup> Cir. 1996) (when a punitive damages claim makes up the bulk of the amount in controversy, the court will "scrutinize that claim closely" to be certain jurisdiction exists).) Indeed, courts increasingly view punitive damages claims with skepticism, especially if asserted for the apparent purpose of meeting the jurisdictional minimum. (*See, State of Missouri Ex.rel. Pemiscot County v. Western Surety Company*, 51 F.3d 170, 173 (8<sup>th</sup> Cir. 1995); *Miller v. European American Bank*, 921 F.Supp. 1162, 1167 (SD NY 1996); *H&D Tire and Automotive Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329 (5<sup>th</sup> Cir. 2000) (no evidence of conduct that would support punitive damages award of "roughly 5-690 times actual damages").

Unlike federal question jurisdiction, the Court may "consider post-removal evidence in determining whether the requisite amount is in controversy" for purposes of diversity jurisdiction. (*Mattel, Inc. v. Bryant*, 441 F.Supp.2d 1081, 1093 (C.D. CA 2005), *citing*, 16 James William Moore, et al., *Moore's Federal Practice*, § 107.14(2)(g) n. 102.1 (3<sup>rd</sup> ed. 2004); *see also*, *Singer v. State Farm Mutual Auto Insurance*, 116 F.3d 373, 377 (9<sup>th</sup> Cir. 1997) (the court may consider plaintiff's counsel's post-removal oral admission to court).)

## IV.

## ARGUMENT

It is undisputed that the total number of telephone calls KINDER claims were made to his (619) 999-9999 telephone number by any "Harrah's" entity is 7. Attorney Austin, KINDER's counsel, has admitted this repeatedly in recent declarations signed under penalty of perjury and

1 filed with this Court. (Exhs. 3, 4.) KINDER had not previously quantified the total number of  
2 telephone calls that were at issue, in either his Original Complaint or the First Amended  
3 Complaint. (Exhs. 1, 2.) Even assuming that KINDER is able to satisfy his burden to show that  
4 each of those 7 purported telephone calls was made in "willful" violation of the TCPA, the  
5 maximum amount of recovery would be \$1,500 for each such "willful" violation – or a total of  
6 \$10,500. (47 U.S.C. § 227(b)(3).) Of course, KINDER will also seek attorneys' fees on top of  
7 that figure, but even factoring a very liberal amount of attorneys' fees, the amount in controversy  
8 in this action patently falls far short of the \$75,000 jurisdictional threshold of this Court under  
9 diversity jurisdiction. (28 U.S.C. § 1332(a).)

10  
11 The Ninth Circuit has recognized that a plaintiff's counsel's admission regarding the  
12 jurisdictional amount in controversy, was properly considered by the District Court in determining  
13 whether diversity jurisdiction existed. (*Singer v. State Farm*, 116 F.3d at 376.) Here, Attorney  
14 Austin has admitted repeatedly, under penalty of perjury, that the total amount of damages  
15 KINDER could recover for the telephone calls purportedly at issue is \$10,500 (assuming a \$1,500  
16 "willful" violation for each of the 7 alleged telephone calls). (Exhs. 3, 4.) The fact that KINDER  
17 only claimed 7 total telephone calls was missing from his Original Complaint. (*See*, Exh. 1.)  
18 Thus, at the time of removal of this action on November 21, 2007, there was less than \$75,000 in  
19 controversy – a fact which Harrah's Entertainment, Inc. was unaware of because KINDER failed  
20 to quantify his damages in his Original Complaint. Where an original complaint does not specify  
21 damages (as with KINDER's Original Complaint), a plaintiff's post removal admission that  
22 establishes the amount in controversy is less than \$75,000 has been held to show a lack of removal  
23 jurisdiction. (*Asociacion Nacional de Pescadores*, 988 F.2d at 565.)

24  
25 Counsel for Defendants attempted to meet and confer with Attorney Austin prior to filing  
26 the instant motion to remand, to obtain a stipulation to remand. Although Attorney Austin did not  
27 dispute that the total number of telephone calls at issue was only 7, he maintained that the  
28 possibility of punitive damages might put the amount in controversy over \$75,000. (Giusso Decl.,

¶ 3.) However, as noted above, trying to maintain diversity jurisdiction by factoring in a speculative punitive damages claim is very closely scrutinized by the trial court. (*Anthony v. Security Pacific Financial Services, Inc.*, 75 F.3d at 315; *State of Missouri Ex.rel. Pemiscot County*, 51 F.3d at 173; *Miller v. European American Bank*, 921 F.Supp. at 1167; *H&D Tire and Automotive Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d at 329.) Indeed, considering the facts of this case, *i.e.*, are that some "Harrah's" entity allegedly made 7 phone calls to a pager number that was never answered by KINDER, it is highly improbable that a trier of fact would find such conduct warrants punitive damages. Given that the total amount of damages for "willful" violations of the TCPA is \$10,500, to find that the jurisdictional amount in controversy is met based purely on a speculation of punitive damages, would be essentially turning a blind eye to the diversity jurisdiction requirements of the United States Code.

Inasmuch as KINDER's total claim for damages can be liberally estimated at \$10,500, it is crystal clear that the amount in controversy in this action does not meet the threshold amount of \$75,000 and that this Court lacks diversity jurisdiction. This case should be appropriately remanded back to the Superior Court of San Diego County.

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V.

CONCLUSION

Because the total number of alleged telephone calls at issue is known and is not in dispute, it is apparent that even if KINDER makes out "willful" violations of the TCPA, the maximum he could recover for each such telephone call is \$1,500. The undisputed facts, which were not set forth in the Original Complaint at the time of removal, patently indicate that the amount in controversy falls far short of the \$75,000 amount in controversy required for this Court to maintain diversity jurisdiction over this action. This is true even factoring in a generous estimate for attorneys' fees on top of that figure. Therefore, this Court is respectfully requested to remand this action back to the Superior Court of San Diego County as it is apparent that diversity jurisdiction is lacking.

SHEA STOKES ROBERTS &amp; WAGNER, ALC

Dated: May 13, 2008

By: s/Maria C. Roberts

Maria C. Roberts

Ronald R. Giusso

Attorneys for HARRAH'S ENTERTAINMENT,  
INC.; HARRAH'S OPERATING COMPANY,  
INC.; HARRAH'S MARKETING SERVICES  
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